ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of Section 301(j) of the Telecommunications Act of 1996	)	CS Docket No. 96-57
Aggregation of Equipment Costs by Cable Operators	)	

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner") hereby respectfully submits these comments in response to the above-captioned Notice of Proposed Rulemaking released by the Federal Communications Commission ("FCC" or "Commission") on March 20, 1996.[1] Time Warner, a division of Time Warner Entertainment Company, L.P., owns and operates cable television systems across the nation. Furthermore, Time Warner has entered into a Social Contract with the FCC pursuant to which Time Warner has been permitted to engage in equipment and installation cost averaging.[2] Accordingly, Time Warner is directly interested in the proposals set forth in the NPRM as they might affect its cable television operations.

[1]Notice of Proposed Rulemaking, CS Docket No. 96-57, FCC 96-117, ____ FCC Rcd _____ (rel. March 20, 1996) ("NPRM").

[2]Memorandum Opinion and Order, FCC 95-478, ____ FCC Rcd _____ (rel. November 30, 1995); Erratum, DA 96-16, ____ FCC Rcd ____ (rel. January 17, 1996) ("Social Contract").

I. AGGREGATION

Section 301(j) of the 1996 Telecommunications Act requires the FCC to allow regulated operators to aggregate "their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category."[3] In its NPRM, the Commission has tentatively concluded that the statute requires that equipment be classified and placed in categories based on the "primary purpose" of the equipment.[4] The NPRM, however, does not attempt to define the term "primary purpose" nor does it indicate whether cable operators will be permitted to choose to aggregate certain types of equipment serving the same primary purpose while retaining specific categories for other equipment which serves the same primary purpose.[5] Time Warner believes that the Commission should provide cable operators with the maximum flexibility in determining the degree to which they choose to aggregate their equipment costs within the broad categories permitted.

In specific cases, aggregation may make sense for some types of equipment but not for others within the same category. It is not uncommon for cable operators to have deployed several different models of converters within the same cable system as advances in technology allowed converters to be offered with varied features. For example, certain converters may not come equipped with remote control capability. Other converters might have a built-in remote control while other models might have a built-in timer with remote control. Still other models

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[3]47 U.S.C. § 543(a)(7)(A).

[4]NPRM at ¶¶ 8-11.

[5]Given the rapidly evolving technologies and newly emerging services in the telecommunications and cable industries, it can be anticipated that multi-purpose equipment may become more prevalent. Accordingly, it will become increasingly difficult to categorize equipment based on a "primary purpose." The Commission should establish broad categories for aggregation purposes which correspond to its existing categories of converters, remotes and inside wiring.

might have built-in parental control capabilities or provide program guides and other on-screen displays. Certainly, it is not uncommon for operators to utilize an addressable converter capable of descrambling premium and pay-per-view services, and also make available several different models of non-addressable converters for customers that do not have cable ready TV sets capable of tuning all non-premium channels offered on the cable system on an unscrambled basis.

Cable operators may well desire to aggregate all non-addressable converters in calculating equipment basket costs while continuing to charge a separate non-aggregated rate for the more technologically advanced addressable converters. In other cases, the operator may desire to charge a single blended rate for all converters. A cable operator desiring to aggregate its equipment costs should not be faced with an "all or nothing" choice which requires it to elect either to aggregate all equipment or forego aggregation entirely. The Commission should make clear that an operator who desires to aggregate the costs for certain equipment that serves a specific primary purpose may nevertheless elect to continue to retain specific non-aggregated subcategories of equipment which serve the same or a similar purpose.

II. INSTALLATION CHARGES

The Commission has tentatively concluded that Congress did not intend cost aggregation be permitted to the same extent for installation charges as for other equipment charges. The Commission bases this conclusion on the language of Section 301(j) of the 1996 Act that refers to equipment but not installations, as well as on its belief that installation charges, being labor dependent, are more likely to vary widely between communities than equipment costs. However, recognizing that a complete prohibition on installation aggregation could impose additional burdens on cable operators, the Commission has proposed that operators be permitted to aggregate installation costs based on specific service areas designated by the operator where

the installation costs are "substantially similar" throughout all franchises in that designated area.[6]

Although Time Warner supports the Commission's decision to allow cable operators to designate specific service areas for calculating an aggregated, or average, installation charge, the Commission's approach does not go far enough. There is no sound basis to distinguish between equipment and installation costs for purposes of aggregation. The fact that the 1996 statute refers to equipment but does not mention installation is not persuasive evidence that Congress intended to apply different aggregation rules for equipment and installation. Congress was certainly familiar with the FCC's rate regulations which expressly include installation costs in the equipment basket. Indeed, the HSC labor component is used to calculate both equipment and installation costs. Thus, it was reasonable for Congress to assume that installation would be subsumed under its general statutory reference to equipment and that the same aggregation rules would apply to both.[7] It is not reasonable to assume that Congress intended to streamline the rate regulation process and reduce regulatory burdens on cable operators by allowing them to aggregate equipment costs at one level (thereby reducing the number of Form 1205 calculations to be performed annually) and at the same time negate the benefits of such streamlining by requiring operators to aggregate installation costs at a different level (thereby increasing the number of Form 1205 calculations to be performed annually).

Likewise, despite the Commission's belief that labor intensive costs, such as those incurred in connection with service installations, are more likely to vary than equipment costs, Time Warner does not believe that such variations are likely to be significant on a community-

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[6]NPRM at ¶ 12.

[7]Indeed, the fact that Section 301(j) makes explicit reference to Section 623(b)(3) of the Communications Act, which expressly lists installations as a component of the equipment category, clearly indicates Congress' intent that installations be treated the same as other equipment for aggregation purposes.

by-community basis.[8] To the contrary, the Commission's approach is destined to increase rather than decrease the administrative burdens of rate regulation. Without specific guidelines to enable the operator to determine when installation costs are to be considered "substantially similar," any area designated by a cable operator will remain fertile ground for dispute by local franchising authorities and their consultants and result in a greater number of rate appeals brought before the Commission for resolution. Many of these disputes would be avoided if the Commission allowed cable operators to aggregate their installation costs on the same basis as other equipment costs. In any event, to the extent that the Commission adopts a different treatment of installation and other equipment costs for aggregation purposes, it should provide in its rules that any designated area chosen by the operator would be presumed reasonable and require the local franchising authority and/or its consultant to demonstrate that the operator's specific area was not reasonable in any subsequent appeal to the FCC.

III. EQUIPMENT USED BY BASIC-ONLY SUBSCRIBERS

The 1996 Telecommunications Act states that "aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier."[9] In the absence of any legislative history, the Commission has speculated that Congress' concern was that basic-only subscribers not be forced to subsidize the more expensive equipment often utilized by subscribers taking cable programming, premium and pay-per-view services. Based on this assumption, the Commission tentatively concludes that equipment used by basic-only subscribers may not be aggregated into broad categories and proposes to prohibit the cost of equipment used by basic service only customers from being averaged with other customer

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[8]The Commission's Social Contract with Time Warner expressly allows Time Warner to engage in equipment and installation averaging on a revenue neutral basis within fairly large geographic regions. *See* Social Contract, *supra*, at ¶¶ 37-41.

[9]47 U.S.C. § 543(a)(7)(A).

equipment. On the other hand, the Commission has also indicated its belief that the congressional policy against cross-subsidization would not be violated by allowing the costs for basic-only equipment to be aggregated on a regional or other higher organization level.[10]

Time Warner fully agrees that no policy would be served by preventing cable operators from aggregating the equipment used by basic-only subscribers on a regional or other higher organizational basis. However, the Commission's view that equipment used by basic-only subscribers may not be averaged with other customer equipment or aggregated into broad categories represents an overly restrictive interpretation of the statutory language.

Subscribers who take only the basic service level generally represent the smallest fraction, generally no more than five percent and frequently less, of a specific cable operator's customer base. Cable operators may offer only one type of converter to all of their subscribers. It is also not uncommon for cable operators to have a plain converter for basic-only customers but also to allow those subscribers, if they so choose, to lease the same equipment that is available to customers taking additional levels of service in order to have the option of ordering pay-per-view or premium programming which the cable operator is required to make available to them once the cable system is technically capable of complying with the statutory tier buy-through provisions contained in Section 623(b)(8) of the Communications Act.[11] In some cases, subscribers who avail themselves of this option never or only occasionally order a pay-per-view service. Arguably, these subscribers should not even be considered basic-only subscribers for aggregation purposes. In any event, where subscribers lease the same equipment that is available to other subscribers, and especially where they voluntarily do so in order to have the option to purchase additional services, cable operators should not be precluded from taking

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[10]NPRM at ¶ 13.

[11]47 U.S.C. § 543(b)(8).

advantage of the reduced regulatory burdens and administrative efficiency afforded by the statutory equipment aggregation provisions. To prevent cable operators from aggregating their equipment costs into broad categories in cases where the same equipment is used by basic-only and other subscribers would allow the limited exception pertaining to basic-only customers to swallow the equipment aggregation rule.

Furthermore, the Commission's belief that Congress intended to avoid cross-subsidization by basic-only subscribers of more sophisticated equipment utilized by other subscribers does not hold up when basic-only subscribers have the option to utilize the same equipment as that utilized by subscribers taking higher levels of service. The cross-subsidization concern has the most force in situations where the cable operator designates a class of equipment which is available exclusively to subscribers taking only the basic level of service and does not provide them with the option of upgrading that equipment. The exception to the equipment aggregation provision should apply only in such circumstances. Otherwise, operators desiring to aggregate their equipment costs would be required to limit the equipment choices available to basic-only subscribers. Certainly, less consumer choice cannot be what Congress intended.

In the event that the Commission does not limit the prohibition on aggregation to equipment which is utilized exclusively by basic-only subscribers, it should allow the cost of any equipment which is used by both basic-only subscribers and other subscribers to be separated from each other and then aggregated within those subclasses on their respective Forms 1205. Although this would require cable operators to prepare two sets of equipment basket calculations, one for basic-only subscribers and one for all other subscribers, it is better than the alternative which would require cable operators to restrict the equipment choices which they make available to basic-only subscribers, thereby creating a disincentive for those basic-only subscribers who might wish to exercise their statutory right to purchase pay-per-view and other similar services.

IV. EQUIPMENT JURISDICTION AND REVIEW

The Commission has recognized that review of aggregated equipment data by each of the local franchising authorities regulating a particular operator's rates could lead to potentially inconsistent orders regarding that data and has sought comment as to whether there is an alternative that could be more administratively efficient for local franchising authorities and cable operators alike.[12]

The most effective way to prevent inconsistent local decisions and minimize appeals would be to have the Commission review all cable operator FCC Forms 1205 that have been prepared on an aggregated basis. Centralized review by the Commission would ensure consistency of result and would promote administrative efficiency by obviating the need for each individual franchising authority to review identical Forms 1205. Such an approach is clearly permitted under the statute since the aggregated equipment which the Commission will be reviewing will include equipment that is used not only to receive basic service but cable programming and premium services as well. Because the Commission retains jurisdiction and authority to review cable programming service tier rates, including the rates for equipment which is used to receive cable programming services, it clearly has the statutory authority to review aggregated equipment rates and in fact does exactly that under its Social Contract with Time Warner.[13]

In the event that the Commission continues to require equipment rates to be determined by local franchising authorities in the first instance, it must make clear that any decision which it issues in connection with a rate appeal involving aggregated equipment rates will be binding on all local franchising authorities subject to the same aggregated rate. To this end, the

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[12]NPRM at ¶ 14.

[13]*See* Social Contract, *supra*, at ¶41 (Commission review of aggregated equipment and installation rates found not to violate any provision of the 1992 Cable Act).

Commission should adopt a rule that would allow a cable operator to put its equipment rates into effect in all franchise areas covered by the aggregated rates pending any such appeal. In the event the Commission determines that the rates were too high, the cable operator would be required to prospectively reduce its equipment rates to the level established by the Commission and could be required by the local franchising authority to issue refunds in any cases where the LFA disapproved the cable operator's equipment rates.

V. CONCLUSION

Based on the foregoing, Time Warner requests the Commission to adopt equipment aggregation rules that: 1) give cable operators the flexibility to define subcategories of equipment within the broad categories established by the Commission; 2) allow installation costs to be aggregated on the same basis as equipment costs; 3) allow equipment used by both basic-only and other subscribers to be aggregated on the same basis as any other equipment; 4) allow equipment used exclusively by basic-only subscribers to be allocated on a regional, company or other geographic level; and 5) provide for FCC review in the first instance of Forms 1205 prepared on an aggregated basis.

Respectfully submitted,

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